IN THE

SUPREME COURT OF THE UNITED STATES.

No. 104.

JOHN CARROLL BRENT, SURVIVING EX'R OF SARAH DIGGS, DECEASED, PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND, FOR THE USE OF AUGUSTUS M. WARFIELD AND SUSAN E., HIS WIFE, OVERTON C. BOETLER AND JAMES S. BOETLER, BY HIS NEXT FRIEND, SUSAN BOETLER.

In error to the Supreme Court of the District of Columbia.

Brief of S. S. HENKLE, *Attorney for Defendents in Error.*

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The case shown by the record is this: Daniel C. Diggs, as solicitor for Overton C. Warner, filed a Bill in Equity in Prince George's County, Maryland, against the widow and minor children of William Boetler, deceased, for the sale of certain lands of the said Boetler, for the payment of debts, there being an insufficiency of personal assets. The Court passed the decree of sale and appointed the said Daniel C. Diggs, the solicitor, trustee to make it. He was required to give bond in the sum of fifteen thousand dollars, which he

did, with Sarah Diggs as one of his sureties. By said decree, among other things, the trustee was ordered to bring into Court the money arising from such sale or sales, and the bonds or notes which may be taken for the same, to be disposed of under the direction of the Court. The trustee made sale and reported to the Court, but never brought into Court the money, notes, nor bonds, the proceeds thereof. Upon the subsequent proceedings in the case, the auditor reported a distribution of the funds in the hands of the trustee, finding that each of the *cestuis que trust* of the defendant in error was entitled to the sum of $704.39¼, (Record p. 14) and thereupon the Court, on the 11th of April, 1860, confirmed the report and ordered the trustee to pay over to the parties entitled, etc. (Record p. 15.) The trustee did not pay over as ordered, but shortly afterwards died insolvent.

Although several pleas were interposed, the only defence urged by Mr. Brent, who argued the case in the Court below for the plaintiff in error, was that no action could be maintained against the trustee, nor against the sureties upon the bond, without first serving the trustee with *notice* of the passage of the order, and making *demand* of payment from him.

The trustee was the solicitor in the cause when the order was made, and it was probably prepared by him and passed at his instance.

Diggs, the trustee, died in 1860 or 1861, and my clients were all then infants in law, and babies in fact.

Were we required to give formal notice of the passage of the order, and demand payment from the trustee?

John Harris, Ex'r, vs. Richard Farrand, Hardres' R. 36. Was an action at law upon a collateral undertaking. Verdict for plaintiff, and motion in arrest upon several grounds, one of which was *default of notice.*

The Court say "notice was not required, because the fact does not rest in the conusance of the plaintiff more than

the defendant." This is one of the earliest cases, and is cited in nearly all of the cases, English and American, involving the same question, from that day to this.

Farwell vs. Smith, 12 Pick., 83, the Court say "where a fact which one party does know or is bound to know, or which is equally known to both parties, becomes material, no notice thereof need be given by the other."

Allard vs. Lane, 6 Shepley (Maine) p. 9, was a suit upon a written obligation to pay the price of an interest in certain real estate, when the plaintiff should procure the discharge of a certain mortgage held upon the property by a third party. A discharge was procured and entered upon the margin of the record three months before the suit was brought. It was objected that the plaintiff should have given notice of the discharge of the mortgage before suit brought. The Court say "It is contended that the performance of the condition being peculiarly in the knowledge of the plaintiff, he was bound to give notice to the defendant, and there are authorities to this effect, as where the *act on which the plaintiff's demand arises is secret and lies only in the plaintiff's mouth*, which is one of the illustrations of the rule put by Baron Comyn." Com. Dig., Pleader c. 73. In this case there was a privity between the defendants, who were the assignees of the mortgagor, and the mortgagees. Besides, the discharge of the mortgage was on the day it was made more than three months before the action, entered of record to give notice to the public generally, and to parties and privies in interest in particular. If this, therefore, was one of the class of cases to which the rule would have applied, if the fact had been particularly in the knowledge of the plaintiff, we are of opinion that the discharge of this mortgage was not of that description. "A distinction has been taken between a precedent debt or duty, and where the obligation to pay arises altogether upon the happening of the condition. In the latter case a precedent request is essential, and in the former it is not. 1 Saund., 33. Here the

debt existed, but the time of payment was postponed until a certain condition was performed. *That done the debt became presently due.*"

Daniel Hobart vs. Wm. Hillard, 11 Pick., 143, was an action of debt on recognizance for an appeal, conditioned that appelant should prosecute his appeal with effect, and pay all intervening damages and costs. Breach. That he did not prosecute his appeal with effect, but became nonsuit and judgment was entered against him for costs. Plaintiff further alleged his damages and costs in defending himself amounted to a large sum of money, to wit, $20, which has never been paid by the plaintiff *licet saepius*, &c.

Demurrer. Questions whether the breach was well assigned. By the Court: "It is objected that there is no averment that notice was given to the defendant (the surety), or to Trainer the principal of the recovery of judgment for costs; nor is it alleged that there was any special demand of payment; and it is contended that these are substantial defects in the declaration. The general rule as to notice is, that when the matter alleged in the pleading is to be considered as lying more particularly in the knowledge of the plaintiff than of the defendant, then the declaration aught to state that the defendant had notice thereof. 1 Chit., Pl. 320. But, if the defendant had contracted to do a thing on the performance of some act by a stranger, no notice of performance need be averred, for it lies in the defendant's knowledge as much as the plaintiff's, and both parties are bound to take notice. Cutter vs. Southern, 1 Saund., 81 and 116. So if one be bound to make such an assurance as G. S. may advise, he must take notice of the assurance advised at his peril. Cole's case, 1 Cro. Eliz., 977. So in debt on a bond for the performance of an award, it is not necessary to aver that the defendant had notice of the award unless such notice is expressly required by the terms of the condition. 2 Saund., 62. Com. Dig. Plead c. 75. On these authorities and on principle its seems very clear that no averment of

notice to the defendant of the recovery of the judgment in the former suit is necessary. *The defendant was attorney of record in that suit.* It is admitted in the declaration that he entered the appeal, *and he must be presumed to have had knowledge of the non-suit and of its legal consequences, the judgment of recovery for costs. Notice, therefore, to him would be a useless ceremony which the law never requires.* Nor was a special demand necessary. In this respect the surety stands on the same footing as the principal."

Elisha Punderson vs. Thomas Shephard, 8 Pick., 379. Sylabus, "where the plaintiff agreed to perform work for the defendant upon a canal, and the defendant agreed to make payments "from time to time, by certificates from the engineer, as the work advanced," it was held that the plaintiff might bring an action without giving notice to the defendant of a certificate previously made, each party being bound to take notice." The action was covenant on an indenture.

Dewey, for the defendant, contended that the action would not lie, except after a presentation to the defendant of the engineer's certificate, or at least, notice that such certificate had been given.

Strong and Ashman, contra, said that the plaintiffs were not bound to present this certificate or give such notice; that making the certificate was the act of a third party, of which each party was bound to take notice—as in the case of an award. Com. Dig., Pleader, c. 175, 2 Saund., 62, Note 4, and of this opinion were the Court.

Havner vs. Snow, 14 Pick., 28, was an action on the case against a deputy sheriff for neglecting to serve a suit of attachment, by reason whereof other creditors whose writs were subsequently issued obtained priority of lien. It appears that the officer had, in fact, made the attachment in time, but in his return had made a mistake in the date. It also appears that Caines, whose attachment was levied, in fact, subsequently to the plaintiffs, but was advanced by the mistake of the officer in his return to the plaintiff's writ, was

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represented by the same attorney as the plaintiffs. The Court, in the decision of the case, say: "The other circumstance by which this case is distinguished from that of Emerson vs. Upton, is, perhaps, not less important. The demandant, in that case, had no notice of the attachment set up against him before he recorded his mortgage deed. In the present case, the Messrs. Cames had constructive notice of the plaintiff's attachment before sueing out this writ. The plaintiff's attorney was also employed by them, and he had sufficient notice of plaintiff's attachment. He directed the order of the attachments, and he could have had no reason to doubt that the plaintiff's attachment had been made as directed. *Now it is a well established principle, that notice to an agent or attorney is presumptive notice to the party himself.* 2 Fonb'l, 153, as where all the securities were transmitted by the same scrivener, notice to him is notice to all the parties. Brotherton vs. Hatt, 2 Vern., 574. "There may be cases where a party would not be bound by the knowledge of the facts possessed by an agent or attorney, as where such fact have come to his knowledge a long time before he was engaged to act as agent or attorney, or under circumstances which would warrant the presumption that he had forgotten the facts. But in this case, the attorney of the Messrs. Cames was the attorney of all the attaching creditors; he acted with a full knowledge of all the facts." "*Under these circumstances, notice to the attorney is sufficient and equivalent to notice to the party himself.*"

Brotherton vs. Hungerford, 2 Vern., 373. By the Court: "It was first decreed at the Rolls and now affirmed upon an appeal to the Lord keeper, that Mrs. Brotherton should be paid next after Marsh, and then Mrs. Hatt, and so the rest, as they stood in order of time; because all the securities being transacted at the shop of Williams and Ellecker, the scriveners who were witnesses and engrossed all the securities, and were in nature of agents to all the lenders; and notice to the agent is good notice to the party, and, consequently, they that lent

last must come last, having notice of what was lent before."

2nd Foublanque Eqt. 153. "And notice of the plaintiff's title to the agent or purchaser for another; as likewise, notice to the counsel or attorney that proves the title is notice to the party himself, because a presumptive notice to the party."

Dyer vs. Rich, 1 Matcalf, 180. Was an action of *assumpsit* on an agreement in writing by which the Rockingham Manufacturing Company, of Vermont, were to pay John F. Dyer, of the City of Providence, $20,000 for his patent for an improvement in the Damask Loom, which payment was to be made a certain amount in notes, and balance in certificates of stock in the company with this stipulation, "and that if, at the expiration of the said two years, the capital stock actually paid in, including the agreed value of said patent right, shall not be equal to the sum of $500 on each share then issued, we will forthwith, *upon demand*, pay to the said Dyer, such further sum or sums of money as in addition to those which have been paid in, as aforesaid, shall amount to the sum of $500 on each of said shares."

The declamation, after setting forth said agreement, concluded thus: "And the plaintiff avers that, though said two years have elapsed, he has not received a certificate of ten shares of said corporate stock with a sufficient receipt of the payment of the par value thereof, to wit: of the sum of five hundred dollars on each share; nor has the capital stock been paid in, which, with the agreed value of said improvements, as aforesaid, would make the whole capital equal to one hundred thousand dollars. By reason of all which, and of their promise, aforesaid, the said defendants have become liable to pay to the plaintiff such sum of money as in addition to those paid in, would amount to the sum of five hundred dollars on each of said ten shares, to wit: the sum of five thousand dollars. Yet, *though requested*, they neglect so to do."

Upon the trial below, the plaintiff proved the execution of the agreement and rested his case; whereupon the defendant

Walker & McIntire the further sum of fifteen hundred dollars. And Walker & McIntire agreed that if, after making all proper efforts to sell in Europe, they should not be able to effect sales to the amount of $1,000, and all expenses of their agency, they would repay to Watson & Austen said $1,000 and expenses of the agency, etc., in currency, and issue to Watson & Austen the full undivided half of the patent-right within the United States. The plaintiffs aver that they sent the agent to Europe, etc., and that he was unable to make the sales, etc. That they necessarily incurred great expense and laid out a large sum of money, to wit: the sum of three thousand dollars, of all which said Walker & McIntire, thereafter, to wit: at said time, on the 1st day of June, 1841, had notice, and although they had fully kept and performed the agreement on their part, the defendants had not repaid the $1,000 and their reasonable expenses, nor any part thereof, nor conveyed to them the one-half of the patent for the United States, though requested so to do, but neglect and refuse, etc." Several pleas were interposed, upon which issue was joined. The fourth plea set up that, although the plaintiff sent an agent to Europe, etc., yet the plaintiff did not, within a reasonable time, make known to them that they had been unable to effect sales, etc., *and request* a repayment of the one thousand dollars and expenses, or a conveyance of the undivided half of said patent for the United States, as by their covenant they were bound to do. To this plea there was a general demurrer and joinder. The question was: were the plaintiffs bound, within a reasonable time, to make known their failure to make sales in England, and make demand of the defendants to pay the $1,000 and expenses, or to convey to them the one undivided half of the United States.

The Court say: "In relation to notice the rule is, *that whenever the fact upon which the defendant's liability is incurred, lie peculiarly within the knowledge of the plaintiffs, notice thereof must be stated to have been given to the defendant.* But where the matter lies as much within the cognizance of one party as the other, notice is not necessary. When, however, notice is necessary either by the terms of the contract or by its nature, it is of the

gist of the action, and must be specially averred in the declaration, for without such averment no complete right of action can appear. 1st Saund. on Pl. and Ev., 132. Gould's Pl., c. 4, sec. 15 Rex vs. Holden, 7 Tenn., Rep. 621. Lent vs. Paddleford, 10 Mass., p. 230. Clough vs. Hoffman, 5 Wend., 500. To these many others might be added."

The Court held that the knowledge of the failure to make sale being peculiary within the knowledge of the plaintiffs, and the defendants could not know it unless communicated to them by the plaintiffs, were entitled to notice. As to the demand, the Court say "whether it was necessary to make a special request for a performance of the conditions before suit, depends upon the question whether upon notice being given of the failure to effect sales by the plaintiffs, the obligation on the part of the defendants was complete.

The defendants contracted to repay the one thousand dollars, and also the expenses of the agency, or to convey one-half of the right in the United States in case the plaintiffs could not effect sales to the extent set forth in the contract. If, then, the plaintiffs should attempt to make sales and fail, and give notice of their failure to the defendants, they have done all they are required to do by the contract, and the obligation of the defendants arises to repay the one thousand, or to convey one-half of the right in the United States. *When an obligation is complete, a cause of action at once arises, and no formal demand is necessary.* Gould's Pl., ch. 4, sec. 15, Com. Dig.; Pleader, c. 69; Birks *v.* Trippett, 1st Saund., 37; Bul. nisi prius, 151, c. 13, 1st Saund. on Pl. and Ev., 130; Wallis *v.* Scott, 1 Strang, 88.

"In ordinary cases no notice is necessary to the person against whom there is a legal demand, because he is bound to do his duty, and to take notice at his peril that he will be held responsible for the omission of it."

Lessee of Spencer *v.* Marckel, 2 O. R., p. 263.

"No demand is necessary to be made of a clerk for money

which he has received officially and is bound to pay over."
Little *v.* Richardson, 6 Jones, N. C., 305.

"An action may be brought without demand for money in the hands of a person who should have remitted it."
Stacy *v.* Graham, 14 N. Y., p. 495.

"No demand before bringing suit is necessary where a draft is placed in the hands of a broker for collection, and is not collected and paid over, or notice given of non-payment within a reasonable time."
23 Penn. St., p. 21.

"Where the defendant held land in trust to receive the rents and pay fifty pounds half yearly to the plaintiffs wife. Held that he was liable to an action for money had and received, and that without demand."
Roper *v.* Holland, 3 Adophus and Ellis, 99.

There are two or three American cases in which it is held that a lawyer is not liable to a suit for money collected by him until after demand, and the doctrine is based upon the absurd theory that he is not bound to transmit the money until his client directs him how he will have it.

But the Supreme Court of Maine say that an attorney is liable like any other agent, and is not entitled to demand.
Coffin *v.* Coffin, 7 Greenleaf, 298.

If notice were necessary in a case like this the defendant has waived it by pleading over to the merits instead of demurring or setting it up by plea. The issues he tenders are entirely different and inconsistent with the want of notice. He is estoped by his pleadings from requiring of us proof of notice or demand, if that were necessary.
Levins *v.* Randall, 12 Modern, 413.

Gould, Justice: "Where the thing in its nature requires a demand, a bond for doing thereof is not forfited until demand, and in that case the defendant must take advantage

of the want of demand by pleading that he was always, and is still, ready to pay it; for if he plead performance generally, and the plaintiff assigns a breach in his replication, the defendant shall not require and allege want of demand, for that would be a departure. Quod Holt, Chief Justice, concessit. Nichols *v.* Rensaler, 22 Wend., 127.

In a suit on an award, "No demand of the money before suit brought was necessary. The condition of the bond was to pay all such moneys as should be awarded, and by the award the defendants are directed to pay certain sums without any condition or qualification whatever."

Notice to the trustee is averred in the decl., and is not denied in the pleas. The case of Oyster and Annan, 1st Gill and John, relied upon by the plaintiff in error, was peculiar in its facts, and very distinguishable from this. The trustee lived remote from the court, which passed the order, and had no notice nor knowledge of it, until he had been sued in between fifty and sixty suits, and the hardship of these numerous harrassing and expensive suits was pressed with great ingenuity and vigor by his counsel; and it is obvious that the Court yielded to this appeal. The Court say "this proceeding is *res inter alios acta*, and it is but reasonable that when it terminates he shall have *notice* of the result before any steps are taken against him, either by attachment or by action on his trustee's bond against him and his sureties. In the case of an order for distribution and payment *similar to this*, to sustain the plaintffs suit, it appears to us, therefore, that he ought to aver and prove a service of the order on the trustee, and a demand of the sum specified therein; *and that without this notice so averred in the proceedings*, an action on the trustee's bond cannot be maintained."

It will be observed that the Court do not decide that *demand* is necessary, nor that where the trustee has *actual* notice that any further notice is required. Notice is only required in a case *similar* to Oyster and Annan, and that was all the